



August 9, 2001

Ms. Judith A. Hunter
Paralegal
City of Georgetown
P.O. Box 409
Georgetown, Texas 78627-0409

OR2001-3482

Dear Ms. Hunter:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150506.

The City of Georgetown (the "city") received a request to view documents related to a specified law firm, documents related to negotiations between the city and a specified special utility district, and e-mails pertaining to the city's Legal Services department. You state that you are releasing most of the responsive information. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that you failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301(b) provides that a governmental body must ask for an attorney general's decision and state the exceptions to disclosure that apply to the requested information within a reasonable time, but not later than the 10th business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). The city received the written request for information on May 22, 2001. Accordingly, you had until June 6, 2001 to state all of the exceptions to disclosure that applied to the requested information. Since you did not claim that section 552.108 of the Government Code excepted some of the submitted information from disclosure until June 14, 2001, you failed to comply with section 552.301(b) of the Government Code.

When a governmental body fails to abide by the requirements of section 552.301 of the Government Code, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is a demonstration by the governmental body that some other source of law makes the information confidential or that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1997). You claim that the submitted information in Exhibit J is excepted from disclosure pursuant to section 552.108 of the Government Code. However, we conclude that the city has not demonstrated a compelling reason to withhold the information under section 552.108. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information from disclosure provides compelling reason under section 552.108). Accordingly, we do not address your section 552.108 claim regarding Exhibit J. However, as you timely asserted other exceptions to disclosure for Exhibit J, we will address them.

First, however, we note that section 552.022 of the Government Code makes certain information public unless it is expressly confidential under other law. One category of public information under section 552.022 is "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate." *See* Gov't Code § 552.022(a)(5). You state that the information in Exhibits 1, 2, and 3 falls within the purview of section 552.022(a)(5) of the Government Code. You claim that this information is excepted from disclosure pursuant to section 552.107 of the Government Code. However, section 552.107 is a discretionary exception under the Public Information Act and, as such, does not make information confidential.¹ Therefore, we will not address whether section 552.107 excepts the submitted information in Exhibits 1, 2, and 3 from disclosure.

However, you also claim that the submitted information in Exhibits 1, 2, 3, and B through J is excepted from disclosure under Rule 503 of the Texas Rules of Evidence. Although this office does not generally address the applicability of discovery and evidentiary rules to submitted information, the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we first address whether Rule 503 of the Texas Rules of

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Evidence excepts the submitted information in Exhibits 1, 2, and 3 from disclosure. Rule 503 provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (a) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (b) between the lawyer and the lawyer's representative;
- (c) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (d) between representatives of the client or between the client and a representative of the client; or
- (e) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). Based on your statements and our review of the submitted information in Exhibits 1, 2, and 3, we find that you have not adequately demonstrated that the information constitutes a communication transmitted between privileged parties or that it reveals a confidential communication. Therefore, the submitted information in Exhibits 1, 2, and 3 is not excepted from disclosure pursuant to Rule 503 of the Texas Rules of

Evidence. However, you also argue that Rule 503 is "other law" that makes the submitted information in Exhibits B through J confidential. We note that "[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *14 (Tex. Feb. 15, 2001). None of the submitted information in Exhibits B through J is encompassed by the categories of information made public by section 552.022. Therefore, the Texas Rules of Civil Procedure and the Texas Rules of Evidence are not applicable. Accordingly, you similarly may not withhold from disclosure any of the submitted information in Exhibits B through J under Rule 503 of the Texas Rules of Evidence.

You claim that the submitted information in Exhibits 1, 2, 3, and H is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, section 552.104 protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. Section 552.104 also protects information from disclosure when the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 592 at 8-9 (1991), 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* Open Records Decision No. 593 at 4 (1991). Section 552.104 does not apply when there is only a single individual or entity seeking a contract, since there are no "competitors" for that contract. *See* Open Records Decision No. 331 (1982).

You inform us that the submitted information in Exhibits 1, 2, 3, and H deals with pending contract negotiations between private vendors, the Chisholm Trail Special Utility District, and the city. You state that release of this information could jeopardize the city's position in successfully negotiating contracts. However, based on your arguments and our review of the submitted information in Exhibits 1, 2, 3, and H, we cannot conclude that you have sufficiently demonstrated that the release of the information would result in specific harm in a particular competitive situation. At most, you have only made a general allegation of a remote possibility of harm. Furthermore, it appears that only a single entity is seeking to obtain each contract with the city and that there are no competitors for each of those contracts. Therefore, you may not withhold any of the submitted information in Exhibits 1, 2, 3, and H from disclosure pursuant to section 552.104 of the Government Code. Accordingly, you must release Exhibits 1, 2, and 3 to the requestor in their entirety.

You claim that the submitted information in Exhibits B through J is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107 protects information within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office

concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *See id.* at 3. In addition, factual recountings of events or the documentation of calls made, meetings attended, and memos sent are not protected. *See* Open Records Decision No. 574 at 5 (1990). Finally, when a governmental body voluntarily discloses privileged material to a third party, the attorney-client privilege is waived. *See* Open Records Decision No. 630 at 4 (1994). After careful review of the submitted information in Exhibits B through J, we conclude that most of it constitutes either a client confidence or an attorney's legal advice or opinion provided in furtherance of the rendition of legal services to the client that has not been voluntarily disclosed to a third party. However, some of the submitted information in Exhibits B through J appears to have been communicated to third parties, was not communicated to anyone at all, did not contain an attorney's legal advice or opinion or a client confidence, or was not otherwise demonstrated to us to be a privileged communication. Therefore, you may only withhold from disclosure the marked information in Exhibits B through I pursuant to section 552.107. We conclude that no information in Exhibit J is excepted from disclosure under section 552.107 of the Government Code.

You claim that the submitted information in Exhibits C, D, and F is excepted from disclosure pursuant to section 552.103 of the Government Code.² Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party. . . .

. . . .

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

² Because we have concluded that you may withhold the entirety of Exhibits E and G under section 552.107 of the Government Code, we need not address your section 552.103 claims regarding these exhibits.

Gov't Code § 552.103(a), (c). The city maintains the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103. Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See Gov't Code § 552.103(c)*. Based on your statements and our review of the submitted information in Exhibits C, D, and F, we conclude that litigation to which the city is a party is pending. We also find that most of the submitted information in Exhibit C and some of the submitted information in Exhibits D and F relates to the subject matter of the pending litigation. Accordingly, we conclude that you may withhold from disclosure the marked information in Exhibits C, D, and F pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. In addition, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982)*.

You claim that the bracketed information in Exhibit I is excepted from disclosure pursuant to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- a. the location of real or personal property for a public purpose prior to public announcement of the project; or
- b. appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular real or personal property transactions. *See Open Records Decision No. 564 at 2 (1990)*. This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. *See Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982)*. The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, when a governmental body has made a good

faith determination that the release of information would damage its negotiating position with respect to the acquisition of property, the attorney general in issuing a ruling under section 552.306 of the Government Code will accept that determination, unless the records or other information show the contrary as a matter of law. *See* Open Records Decision No. 564 (1990). Upon review of your argument regarding section 552.105, we conclude that you have not demonstrated that release of the bracketed information in Exhibit I would damage the city's negotiating position with respect to the acquisition of the property in question. Accordingly, we cannot conclude that the bracketed information in Exhibit I is excepted from disclosure pursuant to section 552.105 of the Government Code.

You also claim that the submitted information in Exhibit B is excepted from disclosure pursuant to section 552.111 of the Government Code.³ Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). An agency's policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* Open Records Decision No. 615 at 5-6 (1993). However, an agency's policymaking functions do include administrative matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5. You state that the submitted information in Exhibit B consists of communications between the city attorney and other staff members consisting of advice, recommendations, and opinions regarding policymaking processes. Upon review of the submitted information in Exhibit B, we conclude that the information does not concern policymaking processes of broad scope that affect the city's mission. Therefore, we conclude that you may not withhold the remaining information in Exhibit B from disclosure pursuant to section 552.111 of the Government Code.

³ We address section 552.111 for the information in Exhibit B that we have concluded is not excepted from disclosure pursuant to section 552.107 of the Government Code.

In summary, you may withhold from disclosure the information which we have marked in Exhibits B through I pursuant to section 552.107 of the Government Code. You may withhold from disclosure the information which we have marked in Exhibits C, D, and F pursuant to section 552.103 of the Government Code. You must release all other submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

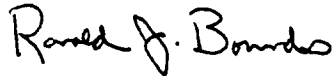
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive, slightly slanted style.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 150506

Enc. Marked documents

cc: Mr. Carter Nelsen
Austin American-Statesman
Williamson County Bureau
203 East Main
Round Rock, Texas 78664
(w/o enclosures)